Supreme Court, U.S.
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No. 97-1502

In the

Supreme Court of the United States

October Term, 1997

NORBERT SCHLEI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AD HOC COMMITTEE TO DEFEND THE INTERESTS OF PRACTICING LAWYERS IN SUPPORT OF PETITION OF NORBERT SCHLEI FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE

The signers of this brief (the "Signers") share two concerns: (1) that petitioner Norbert Schlei has been wrongly prosecuted and convicted for carrying out properly his responsibilities as a lawyer to his clients, and (2) that unless reversed, the decision of the Court of Appeals in this case may establish principles that are not only erroneous but profoundly harmful to lawyers and the legal profession.

The Signers include a number of individuals who have served in high legal posts in federal and state government, including a former Attorney General of the United States, a former Chairman and member of the Securities and Exchange Commission, two former U.S. Assistant Attorneys General, a former General Counsel of the Army and a former Attorney General of California. Others include members of the faculties of major law schools and senior partners of law firms practicing in cities throughout the United States.

Some of the Signers base their view that Schlei's conviction was wrongful on extensive review of the trial record and briefs on appeal. Others base their concern as to the propriety of the conviction primarily on Schlei's character and reputation, which are powerfully inconsistent with any accusation of dishonesty, and on the inherent implausibility – not to say absurdity – of the charges against him. All share a concern as to the effect on lawyers of the decision below.

Injustice in itself may be a sufficient basis for a grant of certiorari. When, however, there is added to injustice the dismaying effect as precedent of the decision below, this becomes a case that fairly cries out for the intervention of this Court.

Pursuant to Rule 37.6, of the Rules of this Court, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The court below expressly grounds its theory of Petitioner Schlei's vicarious responsibility for later criminal acts of his clients and others on a lawyer-client fee agreement that was not criminal and was executed a full year before the starting date of the conspiracy alleged in the indictment. In so doing, the court departed from established precedent and created a new precedent that has appalling implications for lawyers.

Schlei invariably informed would-be buyers of the financial instruments involved in this case that the instruments were disputed and had been rejected by their ostensible issuers as not genuine. By holding that despite such disclosures Schlei could be found guilty of complicity in fraud because he truthfully summarized his clients' claims with respect to the instruments, the court below disregarded the "bespeaks caution" principle of materiality that is well established in civil securities-fraud cases and created a precedent that will improperly burden the performance by lawyers of their function as advocates.

ARGUMENT

I. THE HOLDING OF THE COURT OF APPEALS THAT A LAWFUL RETAINER AGREEMENT CREATES A "CONSPIRACY," MAKING THE LAWYER VICARIOUSLY LIABLE FOR THE SUBSEQUENT CRIMINAL ACTS OF HIS CLIENTS, ESTABLISHES A PRECEDENT THAT IMPROPERLY PUTS ALL LAWYERS AT RISK OF PROSECUTION

The court below expressly grounds its theory of Schlei's vicarious responsibility for later criminal acts of his clients and others on one act – the execution of a lawyer-client fee agreement – that (a) was not criminal, (b) was not claimed by the Government to be criminal,[1] and (c) occurred a full year before the April 1986

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1 The Government has acknowledged that in 1985 when the fee agreement was executed, Schlei and his firm, Hughes Hubbard &

starting date of the conspiracy alleged in the indictment. The reliance of the Court of Appeals on this lawful fee agreement as creating a conspiracy:

(1) puts the court below in conflict with the decisions of this Court holding that an appellate court may not affirm a conviction on a basis which, as here, was neither alleged in the indictment nor presented to the jury; [2]

(2) departs from normal principles of criminal responsibility by making Schlei liable for wrongful acts of others based on his execution of a lawful agreement;

(3) infects the opinion's analysis of other important issues, notably the trial court's refusal to give instructions requested by Schlei; and

(4) has appalling implications for lawyers, putting at risk every lawyer who executes a lawful fee agreement with a client who thereafter undertakes unlawful activity.

The opinion of the court below initially refers to the retainer agreement in its statement of facts. Appendix to Schlei Petition for Certiorari ("Pet. App.") 6a. The opinion then cites the retainer agreement as the primary evidence in Points 2 and 4 to refute Schlei's contention that the evidence was insufficient to support his conviction of conspiracy to "possess and deliver" fraudulent bank notes. Pet. App. 31a, 33a. Having grounded Schlei's joining of the conspiracy on the retainer agreement, the opinion then relies upon Schlei's signing, on behalf of his foreign client, an agreement to assign a bank note to Hill & Associates, *id.* at 31a, yet that agreement expressly disclaimed any warranty as to validity and, as the opinion notes, was accompanied by a cautionary disclosure statement explicitly stating that Japanese governmental and banking officials "challenge the genuineness and the enforceability of these

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Reed, lawfully undertook to render legal services. *See* Brief of Appellee in the Court of Appeals at 40-41.

2 *See, e.g., United States v. Dunn*, 442 U.S. 100, 106-07 (1979).

instruments" and noting that the Dai-Ichi Kangyo Bank had rejected a note "as not genuine." *Id.* at 16a. Citing no other acts of Schlei, the opinion then concludes its discussion of sufficiency (Point 2) by asserting that the evidence permitted the jury to conclude, not that an unlawful conspiracy was formed in April 1986 or thereafter, as alleged in the indictment, but that "the members of the conspiracy, including Schlei, *had not abandoned* their agreement to sell bank notes." *Id.* at 31a. (emphasis supplied).

It is surely inconceivable that a lawyer becomes guilty of a crime by agreeing to represent a client who challenges the truthfulness of a foreign government or financial institution, whether as to the genuineness of financial instruments or any other subject. Such a conclusion would be especially inconceivable as to the scandal-plagued Japanese government, which has publicly acknowledged lying for decades to avoid assuming responsibility to claimants such as the Korean women forced to serve as sex slaves during World War II. Nevertheless, the opinion of the court below flatly asserts that in the absence of a showing of "withdrawal," the retainer agreement made Schlei guilty of everything done thereafter with the financial instruments involved in this case, with or without his knowledge, not only by his clients but by individuals like defendant Hill, with whom Schlei dealt as his clients' adversary and who was represented by his own counsel.

Of course it is obvious that disputed instruments should not be sold without disclosure of the controversy surrounding their genuineness. However, Schlei disclosed to *every* person with whom he discussed the instruments that they had been rejected by their purported issuers as not genuine;[3] further, he disclosed the existence of the controversy at high levels of both the U.S. and Japanese governments. There was no showing that Schlei or his clients cheated anyone; if any failures of disclosure occurred, they were those of people with whom his clients dealt, who had their own counsel and were regarded by Schlei as parties adverse to his clients. To jail the lawyer who *does* make disclosure, because his clients or people with whom they deal do not, is an unjust result that puts all lawyers at risk.

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3 As to the adequacy of Schlei's disclosures, *see infra*, p. 7 *et seq.*

The court below compounds the startling implications for lawyers of its opinion by characterizing as criminal behavior Schlei's attendance at a settlement conference at the Dai-Ichi Kangyo Bank in Tokyo in May 1985 and his formation in January 1986 of a charitable corporation to receive the proceeds of a settlement with the Japanese government which his clients informed him was imminent. Both actions preceded the formation of the conspiracy alleged in the indictment. Although the meeting at the Bank was requested by Schlei expressly to discuss with the Bank its prior refusal to pay the checks, of which it was the ostensible issuer, the court describes the meeting as an attempt by Schlei to "negotiate" the checks.[4] The court also asserts that the forming by Schlei of the Japan-America Foundation, Inc., was "in furtherance of the plan to sell the bond certificates and bank notes." Pet. App. 7a, 39a-40a. However, since the only evidentiary basis for this assertion is the innocuous retainer agreement, the court is, in substance, condemning as criminal the formation by a lawyer of a corporation at the request of a client for purposes not shown to have been in any way unlawful or wrongful.

Other problems for lawyers are posed by the opinion. The court seems to assert that it can be criminal behavior for a lawyer to persist in representing a client after he has been told by his clients' adversaries that they disagree with his clients. Similarly, the opinion seems to assert that a lawyer may not persist in representing a client if confronted with testimony like that of the witness Aoyagi that conflicts with the testimony of his client. The opinion places great emphasis on testimony that Schlei remarked that he found Aoyagi's testimony convincing. As Schlei explained, his remark merely acknowledged that it would be hard for someone listening *only* to Aoyagi to believe in the validity of the instruments.[5] But even assuming that Schlei found Aoyagi's testimony persuasive, his

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4 Pet. App. 7a. In another apparently condemnatory reference to the meeting, the opinion says that in May of 1985 Schlei "attempted to cash" one of the bank notes. *Id.* at 31a.

5 Schlei confirmed his disbelief in Aoyagi's testimony by producing a letter he wrote to AUSA Green later on the same day the deposition was taken.

behavior was not criminal. A lawyer may continue to represent a client although not personally convinced that the client is entitled to prevail. Surely no lawyer understands the law or ethics governing the legal profession to be otherwise.

The court below actually italicizes Schlei's use of first-person pronouns – "we," "our," "us" – in referring to his clients' affairs, in order to suggest that such usage was somehow iniquitous or showed an improper degree of involvement in the clients' affairs. Pet. App. 21a-22a. Surely it cannot be true that lawyers speaking to or for their clients must avoid making statements such as "our position is" or "we contend that" or "the settlement the defendant has offered us" – or risk having those statements cited as evidence of membership in an illicit conspiracy.

The Court of Appeals' determination that the signing of an ordinary retainer agreement created a "conspiracy" was critical to its resolution of other issues in the case. Thus Schlei unsuccessfully sought a correct instruction to the jury explaining that a conspiracy ends when its objectives have been abandoned. Since the indictment alleged that the "conspiracy" began when an agreement to sell a "bank note" to Hill was made in 1986, the jury could have determined pursuant to such an instruction that this "conspiracy" ended when the agreement expired by its terms, or when Schlei's clients promised him in 1989 that they would have no more dealings with Hill, or during the 2½-year period thereafter, prior to the Tampa transaction, when there was no evidence of any effort *by anyone* suggesting any ongoing effort to sell the instruments. The court below solved the need for this instruction by backdating the conspiracy to the 1985 retainer agreement and then holding that thereafter, only "withdrawal" by Schlei — by which the court evidently meant withdrawal by Schlei from his representation of the clients — could put an end to the "conspiracy."

The court's attribution of the conspiracy's beginning to the lawful fee agreement also provided the basis for its rejection of a correct jury instruction sought by Schlei regarding the criminal liability of corporate officers. Thus the opinion assumes that when

the corporation was formed in January 1986 a conspiracy originating with the retainer agreement was already in existence and the corporation was formed to further its aims; therefore, the opinion concludes, the requested instruction "would have misled the jury regarding the liability of a conspirator who forms a corporation to serve as a cover for the illegal activities of the conspirators." *Id.* at 40a. This analysis, grounded as it is in a "conspiracy" supposedly arising out of a lawful fee agreement made a year before the conspiracy alleged in the Indictment, is unsustainable. [6]

It is to be hoped that other courts will have the wisdom not to follow the false reasoning of the court below as to retainer agreements and other proper behavior by lawyers. It would be unwarranted optimism, however, to suppose that there will be no prosecutors who would use the opinion below to justify overly aggressive prosecutions of lawyers based on the court's reasoning. This Court's intervention is needed to prevent the opinion below from serving as a false beacon to judges, prosecutors and others as to the proper role of lawyers and the degree of responsibility they assume for their clients' acts when they agree to represent them.

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6 The opinion says: "Here, the undisputed evidence is that the Foundation was incorporated by Schlei, Han, and Takahashi for the sole purpose of selling the counterfeit instruments." Pet. App. 392. The court may well have been misled as to this subject matter by statements made by the Government in its brief on appeal. However, *in fact* this statement not only is disputed but there is in the record *absolutely no support whatever* for it. The undisputed evidence is that Schlei formed the Foundation to receive the proceeds of a settlement with the Japanese government which his client, Takahashi, informed him was imminent.

II. THE COURT OF APPEALS' HOLDING THAT A LAWYER COMMITS SECURITIES FRAUD BY TRUTHFULLY STATING HIS CLIENTS' CLAIMS, TO A BUYER WHO KNOWS THOSE CLAIMS ARE DISPUTED AND DENIED BY THE ISSUER, EXTENDS THE REACH OF FRAUD LAWS BEYOND REASON AND PRECEDENT, AND IMPROPERLY THREATENS PERFORMANCE BY LAWYERS OF THEIR PROPER FUNCTIONS AS ADVOCATES

The statute underlying Count Ten, 15 U.S.C. § 77q, and the statute defining the object of the conspiracy in Count One, 15 U.S.C. § 480, are both fraud statutes. It is well established that in order to sustain a finding of fraud, there must be evidence of conduct by the defendant that "falls plainly" within the pertinent prohibitions. *United States* v. *Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996). The court below was able to deal with that requirement only by distorting the applicable law and drawing inappropriate inferences from the performance by a lawyer of his proper functions as an advocate.

At the outset, we submit that no one knowledgeable about the financial world would take seriously the possibility of fraudulent sale of the "securities" involved in this case. Indeed, as instruments of fraud the "securities" here involved are downright laughable. Thus, both substantively and in appearance, the Certificates of Redemption or "M-Bonds" involved in this case were unlike any type of financial instrument known to have been issued by the Japanese government or any other issuer in Japan or anywhere else in the world. The Certificate involved in the Tampa transaction had a purported face value in yen of $400 million; the other Certificates held by Schlei's clients had face values up to $4 billion. The Dai-Ichi checks ("bank notes") were readily distinguishable at a glance from ordinary Dai-Ichi checks. They were "stale" years before being seen by any of the parties to this case. Each of them had a purported face value in yen of $400 million. The idea that any sophisticated person or entity capable of purchasing such an

instrument (such as Smith Barney or the First Chicago Bank) could be defrauded by a stranger into doing so borders on the absurd. [7]

In the court below, Schlei, a non-participant in the Tampa transaction that lies at the crux of this case, joined in the argument of defendant Ah Loo that as a matter of law no criminal fraud was involved in the Tampa transaction because of the bizarre nature of the Certificate and its $400-million face value, the fact that Ah Loo had disclosed to the agents at the outset that the Japanese government had said the Certificates were "not real," and the fact that the supposed buyers were obviously aware that the Certificate was defective in some way since they were purchasing it at a discount of 75% from its face value. However, Schlei's primary argument was that whatever was done by the Tampa participants, of whose activities he was completely unaware, he was not shown ever, at any point in the seven-year period spanned by this case, to have committed, agreed to or countenanced any fraud.

Schlei argued below that he was not shown to be guilty of fraud because in every contact he had with a would-be buyer of these financial instruments, he disclosed immediately and forcefully that the issuers of the instruments had denounced them as not genuine and refused to recognize or pay them. This, he contended, told the would-be buyers that the instruments were uncollectible except possibly by litigation. Once that preemptive disclosure was made, he contended, the would-be buyers were sufficiently warned of the rankly speculative nature of the purchase, and all other information as to collectibility was immaterial.

Not so, said the court, finding fraud in Schlei's *truthful* description of his clients' *claims* as to the history and background of the fund supposedly represented by the instruments. This the court held despite the fact that those claims were presented by Schlei not as fact but as claims, not known by him personally to be true, which had been and were being rejected by the issuer — the

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7 Schlei's clients informed him that the instruments were intentionally designed so as to make it impossible to cash or otherwise use them without involving the Japanese Ministry of Finance, which would then be in a position to stop or regulate the transaction.

party without whose approval the instruments could not be collected.

The opinion below also suggests that Schlei "represented that the instruments were genuine." However, Schlei always qualified his statements on that issue as claims made by his clients or based on their assertions. In the context of a dispute where the genuineness of the instruments as against the issuer could only be established by litigation, anything Schlei said as to genuineness could only be interpreted as an informal expression of opinion as to the possible outcome of a hypothetical future litigation. Such a statement by a lawyer, to a person not his client, has surely never before been the subject of a finding of fraud, either criminal or civil.

The decision of the court below extends the law of securities fraud far beyond all precedent. It disregards the wisdom of cases holding that fraud is not shown where the essence of the alleged fraud — here the collectibility of the instrument — is easily checked and would be checked by any reasonable person in view of the nature and magnitude of the transaction.[8] *See United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996); *Pelletier v. Zweifel*, 921 F.2d 1465, 1498-99 (11th Cir. 1991); *United States v. Bruce*, 488 F.2d 1224 (5th Cir. 1973). The decision below also flies in the face of the cases holding that where disclosures are made showing that a proposed investment is highly speculative, so that the situation is one that "bespeaks caution," the buyer cannot complain of fraud if he proceeds without doing his own "due diligence". *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1096 (1991); *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986); *Saltzburg v. TM Sterling/Austin Assocs., Ltd.*, 45 F.3d 399 (11th Cir. 1995); *In re*

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8 Whether the government of Japan or the Dai-Ichi Kangyo Bank (in 1992 the largest bank in the world) is willing to pay an alleged $400-million obligation is a question that can be easily checked through any major bank or securities company. The point made in the opinion of the court below that it would be difficult to check the alleged historical background of the instruments is a false point: it has little or nothing to do with the ultimate issue to an investor of the collectibility of the instruments from their ostensible obligors.

Donald J. Trump Casino Sec. Lit., 7 F.3d 357, 369, 371-74 (3d Cir. 1993) (when "forecasts, opinions or projections are accompanied by meaningful cautionary statements, the forward-looking statements" are "immaterial as of a matter of law"). Under the cases cited, the conduct here involved, made the subject of criminal sanctions by the court below, could not even be made the subject of civil liability.

An essential flaw in the reasoning of the court below as to the issue of securities fraud is its failure to recognize that the *ultimate issue* to an investor, against which materiality must be measured, *TSC v. Northway*, 426 U.S. 438 (1976), is the collectibility of the instrument. Here it was openly disclosed by Schlei *at all times* that the instrument was uncollectible. In the face of that preemptive disclosure, no fraud was possible and none was committed.

The decision of the court below is especially disturbing in its impact on lawyers. The court finds fraud in the mere statement by a lawyer of his clients' claims and in his informal expression of a view — not to his clients but to their adversaries — as to the possible outcome of future litigation. The court's opinion will surely becloud and hamper unduly lawyers' performance of the duties to their clients that society needs and wants them to perform.

CONCLUSION

The Signers of this brief concur in the other grounds for certiorari urged in Schlei's Petition. We refrain from addressing those grounds only because we consider that our primary function is to speak to the particular impact of the decision below on lawyers.

It is always horrifying to confront a situation in which a man has been wrongly convicted of crime and sentenced to prison. However, it is an especially disturbing aspect of the Kafkaesque story of Schlei's indictment and conviction that throughout his seven-year representation of his Japanese clients, his behavior

appears to have consisted of what any good lawyer representing those clients would do.

It is true that Schlei's clients told him an extraordinary story in support of their claim. It is also true, however, that he took extraordinary and lawyerlike measures to investigate their story before providing legal assistance. He conducted an extensive factual investigation in Japan. He consulted high officials of the government of the United States both in Washington and Tokyo; none of them had anything negative to say to him about his pursuing the clients' claims or suggested any conflict between the clients' claims and the interests of the United States.

When Schlei was asked by his clients to assist them in dealing lawfully and properly with a few individuals who wanted to buy instruments from them, he consulted the relevant statutes; he made sure that the would-be buyers had been told that they were dealing with instruments that had been rejected as not genuine by their ostensible issuers; he drafted lawyerlike agreements and disclosure statements that disclaimed warranties, made plain that the instruments were uncollectible, short of litigation, and required the making of representations that similar disclosures would be made to any subsequent offerees. He noted that Hill and Ah Loo were represented by their own competent counsel, and that the proposed prices offered his clients – a small fraction of face value – made it undeniable that the buyers knew they were dealing with questionable instruments.

Schlei took nobody's money – not even a fee. He cheated nobody. He misled nobody. Even his clients cheated nobody, unless they are held responsible for behavior by third parties of which they were not shown to be aware.

What, we would ask, should Schlei have done in representing these clients that he did not do? The opinion of the Court of Appeals gives no satisfactory answer to that question. In the end the court predicates Schlei's guilt on his agreeing, with the approval of his Wall Street firm, to represent these clients and then

doing what any good lawyer would do. The appalling thing about Schlei's fate is that there but for the grace of God go all of us.

Can it really be true that it is criminal for a lawyer to provide representation to individuals challenging the truthfulness of a foreign government's denial of the genuineness of financial instruments? An affirmative answer to that question is, we think, inconceivable, but it seems to be the essential holding of the Court of Appeals.

If lawyers are to carry out their functions in our society, they must be free to advocate claims that may turn out not to be valid. They must be free to provide legal assistance to clients without concern that by associating with their clients and helping them in lawful ways they will be deemed to be "conspiring" to do whatever wrongful things the clients – or, *a fortiori*, parties with whom the clients choose to deal – may subsequently do. It appears to us that Schlei's convictions threaten these critically important principles and we therefore urge the Court to grant certiorari, set the convictions aside and order a judgment of acquittal.

Respectfully submitted,

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